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By Email (SOC@aer.ca)

Alberta Energy Regulator
Suite 1000, 250 - 5 Street SW
Calgary, AB T2P 0R4

Attention: Ayan Solomon, Statement of Concern Team, Regulatory Applications

Dear Ayan Solomon:

Re: Summit Coal Inc. ("Summit")
Application Nos. Coal Conservation Act ("CCA") 1945552, 1945553
Environmental Protection and Enhancement Act ("EPEA") 001-00496728
Water Act ("WA") 001-00496729 and 001-00496730 (the "Applications")
Statement of Concern Nos. 32250, 32252, 32253, 32254, 32255, 32286 and 32287 (the "SOCs")
Summit's Responses to the SOCs

1. Introduction

We are legal counsel to Summit with respect to the above-noted matter. Further to the Alberta Energy Regulator's ("**AER**") letters of August 18, 25, 28, 29, 31, and October 3, 2023, we provide the following on behalf of Summit in response to the SOCs filed on behalf of Arthur Veitch ("**Veitch**"),[1] Alberta Wilderness Association ("**AWA**"),[2] Boyd Basaraba ("**Basaraba**"),[3] Canadian Parks and Wilderness Society ("**CPAWS**"),[4] the Lac Ste. Anne Métis Community Association ("**LSAMCA**"),[5] the Whitefish (Goodfish) Lake First Nation #128 ("**Whitefish**"),[6] the Ermineskin Cree Nation ("**Ermineskin**"),[7] and the Aseniwuche Winewak Nation ("**AWN**").[8]

[1] Statement of Concern No. 32250 (August 17, 2023).
[2] Statement of Concern No. 32252 (August 25, 2023).
[3] Statement of Concern No. 32253 (August 25, 2023).
[4] Statement of Concern No. 32254 (August 28, 2023).
[5] Statement of Concern No. 32255 (August 28, 2023).
[6] As of the date of this submission, the AER has not yet acknowledged receipt of the statement of concern filed by Whitefish on September 28, 2023. While Summit is of the view that this statement of concern was filed late and should be rejected, Summit has provided further submissions herein.
[7] As of the date of this submission, the AER has not yet acknowledged receipt of the statement of concern filed by Ermineskin on September 28, 2023. While Summit is of the view that this statement of concern was filed late and should be rejected, Summit has provided further submissions herein.
[8] Statement of Concern Nos. 32286 and 32287 (September 28, 2023).

Summit has reviewed the SOCs and, for the reasons that follow, submits that the SOCs filed by AWA and CPAWS should be dismissed by the AER in their entirety, as neither of AWA or CPAWS have demonstrated that they may be directly and adversely affected by the Applications. More specifically, Summit submits that the SOCs filed by each of AWA and CPAWS do not account for the fact that Summit's Mine 14 Project near Grande Cache, Alberta (the "**Project**") has already been the subject of a public interest determination by the AER, and was previously subject to a series of robust and comprehensive environmental studies in connection with this determination. In other words, the concerns raised in the SOCs filed by AWA and CPAWS received fulsome consideration in the context of the regulatory proceedings which led to the issuance of the existing *CCA*[9] Mine Permit No. C 2009-6 (the "**Permit**") and Mine Licence No. C 2011-9 (the "**Licence**") for the Project in 2009 and 2011, respectively. Put simply, AWA and CPAWS advocate for denial of the Applications while ignoring the extensive regulatory history of the Project. AWA and CPAWS are not concerned with the specifics of the Applications but are instead opposed to mining generally.

Summit respectfully submits that LSAMCA is also not directly and adversely affected by the Applications. In this regard, Summit notes that the Aboriginal Consultation Office ("**ACO**") did not direct that Summit undertake consultation with LSAMCA, and that Summit has been engaged in ongoing consultations with the AWN and the Mountain Métis with respect to the Project. Summit has also been advised that the AWN and Mountain Métis represent the Métis people in the general vicinity of the Project. In Summit's submission, the concerns raised in the SOC filed by LSAMCA are general in nature and do not support a finding that LSAMCA may be directly and adversely affected. This is underscored by the fact that LSAMCA did not engage with Summit in relation to the Project until March 2023.

Summit respectfully submits that the SOCs filed by Ermineskin and Whitefish should be disregarded by the AER for two reasons. First, both these SOCs were filed late, significantly after the deadline established set by the AER for filing SOCs. Second, neither Whitefish nor Ermineskin are directly and adversely affected by the Applications. The ACO did not direct that Summit undertake consultation with Whitefish or Ermineskin. The concerns raised in the SOCs filed by Whitefish and Ermineskin are general in nature and do not support a finding that either Whitefish or Ermineskin may be directly and adversely affected. Many of the concerns raised are beyond the scope of the Applications and instead relate to cumulative effects or mining generally, as opposed to the specific issues being considered as part of the Applications.

With respect to AWN, Summit has a long history of consulting and negotiating with the AWN. The AWN was consulted with extensively when the original applications were filed and the AER's predecessor made its positive public interest determination approving the Project, and issued the Permit and Licence. As a result of those consultations and negotiations, AWN entered into an Memorandum of Understanding ("**MOU**") with Summit's parent company and supported the approval of the Project, as evidenced by the attached letter from AWN, dated September 10, 2009. Despite committing to support the Project, AWN has now filed an SOC in connection with the remaining Applications. Summit and related companies, as further explained below, are continuing to engage with AWN regarding its concerns, and capacity funding has been provided to AWN to advance this

[9] *Coal Conservation Act*, RSA 2000, c C-17.

engagement. However, regardless of the outcome of these discussions, as further elaborated upon below, the concerns raised by AWN, including in its technical review, do not warrant a hearing.

Finally, while Summit acknowledges that each of Basaraba and Veitch may be directly and adversely affected by the AER's decision on the Applications, Summit submits that the concerns raised in the SOCs filed by Basaraba and Veitch do not warrant a hearing for the reasons outlined herein.

2. Project background

The Project is an underground coal mine located approximately four kilometers north of Grande Cache, Alberta. The Project consists of an access road and mine portal area having a surface footprint of 100.3 hectares, and is located entirely on Provincial Crown lands. As noted above, the Permit and Licence for the Project were issued by the AER's predecessor following the preparation and review of several detailed environmental studies, which were revisited and updated in the context of the present Applications. Beyond the Permit and Licence, necessary land dispositions for the Project have also been issued under the *Public Lands Act*,[10] as well as a Roadside Development Permit issued by Alberta Transportation. Therefore, Alberta has already determined that the Project is in the public interest, as evidenced by the issuance of the Permit and Licence.

In reliance on these past decisions by Alberta determining that the Project is in the public interest, and AWN's previous expression of support for the Project, Summit has continued to advance the Project and in doing so incurred costs totaling over $25 million since it executed the MOU with AWN. Consistent with this, the scope of the AER's adjudications with respect to the Applications should be more narrow compared to applications associated with new greenfield mining proposals. Summit submits that the issue before the AER in the context of the Applications is to determine how the Project can be carried out in a safe and environmentally responsible manner, as opposed to whether it should proceed in general.

Notably, and despite receiving requests for designation under Canada's *Impact Assessment Act*,[11] the Minister of Environment and Climate Change concluded on November 14, 2022 that the Project does not warrant designation for a federal impact assessment. In addition, Summit notes that each of Alberta Environment and Parks (now Alberta Environment and Protected Areas) and the AER previously determined that an environmental impact assessment report under the *EPEA*[12] was not required for the Project in 2006 and 2022, respectively.

3. The SOCs may be dismissed pursuant to the *Responsible Energy Development Act* and the *Alberta Energy Regulator Rules of Practice*

The AER has the requisite authority to and, in Summit's submission, should dismiss the SOCs and proceed to make a determination on the subject Applications without holding a hearing in accordance

[10] *Public Lands Act*, RSA 2000, c P-40.
[11] *Impact Assessment Act*, SC 2019, c 28, s 1.
[12] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

with section 34 of the *Responsible Energy Development Act* ("***REDA***")[13] and the *Alberta Energy Regulator Rules of Practice* ("***Rules***").[14]

In particular, Summit submits that the AER should disregard the SOCs and the concerns raised therein, and determine that a hearing on the Applications is not required, on the basis that the SOCs:

- relate to matters which are beyond the jurisdiction of the AER;
- relate to matters that are beyond the scope of the Applications;
- with respect to each of AWA, CPAWS, LSAMCA, Ermineskin and Whitefish, do not establish that these parties may be directly and adversely affected by the Applications;
- with respect to the AWN, which supported the AER's predecessor's decision to find the Project in the public interest and issue the Permit and Licence, do not disclose concerns which warrant a hearing; and
- with respect to Basaraba and Veitch, while these parties may be directly and adversely affected by the Applications, do not disclose concerns which warrant a hearing.

4. Applicable legislation

Subsections 6.2(1) and (2) of the *Rules* state as follows:

> **Non-consideration of statement of concern**
>
> **6.2(1)** The Regulator may disregard a statement of concern filed with the Regulator if in the Regulator's opinion any of the following apply:
>
> (a) the person who filed the statement of concern has not demonstrated that the person may be directly and adversely affected by the application or a special circumstance set out in section 6.1, as the case may be;
>
> […]
>
> (d) for any other reason the Regulator considers that the statement of concern is not properly before it.
>
> **6.2(2)** The Regulator may disregard a concern raised in a statement of concern filed with the Regulator if in the Regulator's opinion any of the following apply:
>
> (a) the concern relates to a matter outside the Regulator's jurisdiction;
>
> (b) the concern is unrelated to, or relates to a matter beyond the scope of the application;
>
> […]

[13] *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*].
[14] *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013 [*Rules*].

> (e) the concern is frivolous, vexatious, an abuse of process or without merit;
>
> […]

Section 7 of the *Rules* goes on to state:

> **Decision regarding whether to hold a hearing**
>
> **7** The regulator may consider any of the following factors when deciding whether or not to conduct a hearing on an application:
>
> (a) whether any of the circumstances in section 6.2 apply;
>
> (b) whether the objection raised in a statement of concern filed in respect of the application has been addressed to the satisfaction of the Regulator;
>
> […]
>
> (j) any other factor the Regulator considers appropriate.

5. Summit was not required to consult with LSAMCA, Ermineskin or Whitefish

As noted in the AER's correspondence dated August 29, 2023, any assessment of the adequacy of Crown consultation associated with the rights of Aboriginal peoples is outside of the AER's jurisdiction and falls within the purview of the ACO.[15] Section 21 of the *REDA* provides that the AER has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of Aboriginal people.[16]

Similarly, Summit submits that the question of whether Crown consultation is required in connection with a particular project is also beyond the jurisdiction of the AER, and instead rests with the ACO. In this regard, Summit notes that the Alberta Court of Appeal in *Fort McKay First Nation v Prosper Petroleum Ltd*,[17] explained as follows:

> […] Most of the responsibility for managing Crown consultation on AER applications rests with the ACO. The ACO has the responsibility to: (1) determine if consultation is required; (2) manage the consultation process; (3) assess the adequacy of consultation undertaken; and (4) advise the AER on whether actions may be required to address potential adverse impacts of a project on Treaty rights and traditional uses.[18] [emphasis added]

The *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* also confirm this, stating that the AER "will not make a decision on an application until the ACO report [containing the ACO's consultation adequacy decision] is received unless the activity or application

[15] AER Letter re Statement of Concern No. 32255, Summit Coal Inc., Application Nos. *Coal Conservation Act* (*CCA*) 1945552, 1945553, *Environmental Protection and Enhancement Act* (*EPEA*) 001-00496728, *Water Act* (*WA*) 001-00496729, 001-00496730 (August 29, 2023), PDF p. 2.
[16] *REDA*, *supra* note 13, s 21.
[17] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163.
[18] *Ibid* at para 49.

does not require consultation" [emphasis added].[19] Additionally, the AER has referenced ACO pre-consultation assessments when dismissing concerns regarding inadequate consultation, and has confirmed that it is the ACO that determines when consultation is required. In its November 2022 decision dismissing a statement of concern filed by the Fort Chipewyan Métis Association Local 125 ("**FCMA**") [**TAB 1**], the AER stated:

> FCMA expressed concerns about inadequate consultation. The AER has no jurisdiction to assess the adequacy of Crown consultation associated with the rights of aboriginal peoples; the [ACO] determines when consultation is required and adequate. Additionally, Syncrude filed a pre-consultation assessment request for the proposed application on December 2, 2021, and was informed by the ACO that no consultation was required.[20]

Importantly, Summit engaged with the ACO with respect to all of the subject Applications, and the ACO in turn determined that Summit was not required to consult with LSAMCA, Ermineskin or Whitefish in connection with the Project.

6. The SOCs do not demonstrate that any of AWA, CPAWS, LSAMCA, Ermineskin or Whitefish may be directly and adversely affected by the Applications

Subsection 34(3) of the *REDA* provides that only a person who is directly and adversely affected by an application is entitled to be heard at a hearing. Under paragraph 6.2(1)(a) of the *Rules*, the AER may disregard an SOC where its filer has not demonstrated that they may be directly and adversely affected by the application. Subsection 6.2(b) of the *Rules* also provides that the AER may disregard a concern raised in an SOC that is unrelated to or relates to a matter beyond the scope of the application.

In the context of dismissing a statement of concern filed in relation to an application made by Penn West Petroleum Ltd. for a *Public Lands Act* disposition, the AER in its July 27, 2016 letter decision[21] explained that the test for whether a person is "directly and adversely affected" was set out by the Alberta Court of Appeal in *Dene Tha' First Nation v Alberta (Energy and Utilities Board)* ("***Dene Tha'***")[22] [**TAB 2**] citing the prior *Energy Resources Conservation Act*[23] provision:

> The Board correctly stated here that that provision in s. 26(2) has two branches. First is a legal test, and second is a factual one. The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interest or rights. The second test is factual.[24]

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[19] AER and Government of Alberta, *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* (October 31, 2018), s 4.1, PDF p. 9, online (PDF): <https://open.alberta.ca/publications/joint-operating-procedures-for-first-nations-consultation-on-energy-resource-activities>.
[20] AER letter re Statement of Concern No. 32094, Syncrude Canada Ltd., Application No. 00466043-002, November 7, 2022, at PDF pp. 1 & 2, online (PDF): <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/00466043-002-20221107.pdf>.
[21] AER letter re Statement of Concern No. 30296, Penn West Petroleum Ltd., Application No. MSL160320, July 17, 2016, online (PDF): <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/MSL160320_20160727.pdf> [SOC 30296 Dismissal].
[22] *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 [*Dene Tha'*].
[23] *Energy Resources Conservation Act*, RSA 2000, c E-10.
[24] *Dene Tha'*, *supra* note 22 at para 10.

As noted previously by the AER,[25] *Dene Tha'* also requires that the party seeking standing demonstrate "[s]ome degree of location or connection between the work proposed and the right asserted...."[26] The Court in *Dene Tha'* found that the AER's predecessor was provided "very little factual detail or precise information" to determine whether the First Nation may be directly and adversely affected.[27] In this regard, the AER has, on several occasions, cited the following summation of the "directly affected" test provided by the Alberta Environmental Appeals Board ("**EAB**"):

> [**28**] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected.[28]

Based on the above-noted authorities, it is clear that a party must provide specific information as to how they might be directly and adversely impacted by a proposed project. In Summit's submission, the SOCs filed by AWA, CPAWS, LSAMCA, Ermineskin and Whitefish do not satisfy this requirement. Moreover, based on the contents of the SOCs, Summit notes that AWA, CPAWS, Ermineskin and Whitefish appear to harbour concerns with respect to mining activities in general and have not raised any specific issues in relation to the subject Applications.

(a) Summit response to the SOC filed by AWA

As noted above, the SOC filed by AWA does not account for the fact that the Project has already undergone a rigorous assessment by the AER in the context of the original applications for the Permit and Licence. Among other things, this process included a fulsome review of potential Project-related impacts on both provincial and federal species of concern and their habitats, which are the primary concerns raised by AWA. In preparing the subject Applications, Summit also revisited and updated its environmental assessments for the Project, which included matters such as groundwater, air quality, noise, soils, vegetation, wetlands, wildlife, and water management.

In addition, Summit notes that the SOC filed by the AWA contains no explanation as to how the AWA or its members might be directly and adversely affected by the Project. In this regard, Summit submits that the AER should reach the same conclusion as it did in its letter decision relating to a previous statement of concern filed by AWA with respect to an application made by Coalspur Mines (Operations) Ltd. [**TAB 3**].[29] In dismissing the concerns raised by AWA and approving the application, the AER reasoned that:

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[25] SOC 30296 Dismissal, *supra* note 21, PDF p. 1.
[26] *Dene Tha'*, *supra* note 22 at para 14.
[27] *Ibid* at para 16.
[28] SOC 30296 Dismissal, *supra* note 21, PDF pp. 1-2; citing *Tomlinson v Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Evergreen Regional Waste Management Services Commission* (03 April 2013), Appeal No. 12-033-ID1 (AEAB) at para 28.
[29] AER letter re Statement of Concern No. 31723, Coalspur Mines (Operations) Ltd., Application No. 001-00461266, August 13, 2020.

> The AWA is located approximately 343 km from the project and does not own land in or near the project area. The AWA also does not indicate how the AWA or its members make use of the project area and how the project may impact any such activities. Accordingly, the AWA does not identify in sufficient detail how the Application may directly and adversely affect the AWA and its members.[30]

Beyond the concerns raised in relation to provincial and federal species of concern and their habitats, AWA has also raised concerns in relation to general legislated objectives under the *WA* and the *EPEA*, as well as regional planning matters. In Summit's submission, these concerns raised by AWA are generally beyond the scope of the subject Applications, and are related to policy considerations that concern matters well beyond the Project at issue. Summit further submits that these concerns, like those discussed above, are not tied to any evidence that AWA or its members may be directly and adversely affected, and should therefore be dismissed by the AER.

(b) Summit response to the SOC filed by CPAWS

In Summit's submission, the concerns raised in the SOC filed by CPAWS are similar in nature to those contained in the SOC filed by AWA. Summit submits that CPAWS has not provided any explanation as to how the AER's decision on the Applications may directly and adversely impact CPAWS and its members. Accordingly, and for the reasons discussed above in relation to the SOC filed by AWA, Summit submits that the AER should dismiss the concerns raised by CPAWS.

(c) Summit response to the SOC filed by LSAMCA

The SOC filed by LSAMCA generally raises concerns which are related to: (i) air quality and sensory disturbances to area wildlife; (ii) impacts on traditional Métis rights to hunt, trap, fish, and gather; (iii) impacts on LSAMCA members' permanent and seasonal occupancy in the Project area; (iv) sites of historical, cultural, or archaeological interest; (v) access issues; (vi) environmental and human health impacts; and (vii) consultation.

In Summit's submission, the vast majority of these concerns raised by LSAMCA are based on the assertion that the Project is located on Crown lands within the traditional territory of the LSAMCA. Previous decisions of both the AER and the Alberta Courts indicate that the location of a proposed development within the traditional territory of a First Nation or other Indigenous group, on its own, is insufficient to support a finding of direct and adverse effects.

In *O'Chiese First Nation v Alberta Energy Regulator* ("***O'Chiese***")[31] [**TAB 4**], the Alberta Court of Appeal held that a First Nation's treaty rights are not automatically directly and adversely affected by any development undertaken in its territory. The Court summarized the First Nation's argument in *O'Chiese* as follows:

> The O'Chiese First Nation argued that its treaty rights would be directly and adversely affected by **any** development undertaken within the OCFNCA; the argument being

[30] *Ibid* at PDF p. 1.
[31] *O'Chiese First Nation v Alberta Energy Regulator*, 2015 ABCA 348 [*O'Chiese*].

> that once a development had taken place, its traditional treaty rights are lost over the area of the development.
>
> In other words, the O'Chiese First Nation's position is that there is no requirement whatsoever upon it to adduce any specific evidence to show how the Approvals affected it. The argument is that the Approvals, as a matter of law, "directly and adversely" affect the O'Chiese First Nation's rights by the mere fact that both its reserve and the lands covered by the Approvals are situated within the OCFNCA […].[32] [emphasis in original]

The Court held that the AER's decision as to whether a party is directly and adversely affected must be based on the evidence before it, and "the mere fact that the developments in question are located within the [O'Chiese First Nation Consultation Area] does not mean that the Approvals 'directly and adversely' affect the O'Chiese First Nation."[33]

The AER has applied the test from *Dene Tha'* and *O'Chiese* in its consideration of statements of concern in similar circumstances. In its June 2018 decision regarding a statement of concern filed on behalf of the Alexis Nakota Sioux First Nation ("**ANSN**") regarding an application by CST Coal Limited [**TAB 5**], the AER stated:

> ANSN also states that the Mine is in an area of importance to ANSN, and that the Applications have the potential to interfere with the quality of traditional resources relied upon for the exercise of ANSN's Treaty and Aboriginal rights. Although the Mine is located on lands ANSN identifies as within its traditional territory, the statement of concern does not identify specific locations where ANSN's members might be affected or provide the detail needed to show a degree of location or connection with the Mine that would demonstrate that the ANSN and its members are directly and adversely affected by the AER's decision regarding the Applications. The fact that the Mine may be within ANSN's traditional territory does not by itself demonstrate that ANSN is directly and adversely affected by the Applications.[34]

The AER regularly decides that a hearing is not required where traditional rights holders raise generic concerns regarding their exercise of rights near the location of a proposed project, without providing details about where and how these activities may be affected. For example, in its December 2022 decision dismissing a statement of concern filed on behalf of the Lakeland Métis Community Association ("**LMCA**") [**TAB 6**], the AER noted:

- The LMCA is located in the Lac La Biche Area. The proposed project location is approximately 106 km N of LMCA.
- LMCA raised concerns regarding aboriginal rights and traditional land use activities including hunting, trapping, and fishing in the areas around Sunday Creek and within Christina Lake, Kirby Lake, Grist Lake and Winefred Lake, which are LMCA's specified areas of concern.

[32] *Ibid* at paras 37 & 38.
[33] *Ibid* at para 44.
[34] AER letter re Applications 1909050 *et al*. from CST Coal Limited, Statement of Concern 31183, Grande Cache Coal Mine, June 22, 2018, online (PDF): <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/1909050_20180626.pdf> at PDF pp. 1-2; citing *Dene Tha'*, *supra* note 22 at paras 10, 14, 18, *O'Chiese*, *supra* note 31 at paras 43-45.

- Your SOC does not provide information about where members conduct their traditional land use activities or how the activities may be impacted by the proposed project. The concerns raised by LMCA are general in nature.[35]

Similarly, in its October 2022 decision dismissing a statement of concern filed on behalf of the Cold Lake First Nations ("**CLFN**") [**TAB 7**], the AER reasoned:[36]

> […] The proposed project is located on Crown land, approximately 5.3 km from the west boundary of the CLFN's reserve lands and the project is located within land that the CLFN members consider to be part of their traditional territory
>
> The CLFN raised concerns regarding aboriginal rights and traditional land use activities. Specifically, CLFN states that after a desktop review it was determined that the project conflicts with CLFN land use and harvesting of resources, impacts culturally significant plants and culturally sensitive sites, disrupts CLFN continuity of land use and harvesting, and contributes to the cumulative, long-term degradation of CLFN rights and shrinks the total area available for CLFN to practice their Indigenous Rights.
>
> The information provided in the CLFN's SOC is general in nature and does not identify direct and adverse impacts that may result from the proposed project, including how its members rights or traditional land use activities may be negatively impacted.

Very recently, in its September 21, 2023 decision dismissing a statement of concern filed on behalf of the Fort McMurray #468 First Nation ("**FM468FN**") [**TAB 8**], the AER held that:

- Although the Project is located within the FM468FN traditional lands where members exercise treaty rights and traditional land use activities and is located approximately 7.87 km west of FM468FN Reserve lands, the SOC does not, without further factual connection, establish that FM468FN members may be directly and adversely impacted by the applications. Further information is required to establish a sufficient degree of location or connection between the Applications and the potential interference or adverse impacts on the rights and traditional uses asserted.

- Additionally, the information provided in the FM468FN SOC did not identify any significant habitat features or important hunting areas within the site footprint. FM468FN members will continue to have the ability to practice their treaty rights and traditional use activities around the Project footprint.[37]

Summit submits that the above-noted AER and Court decisions are directly applicable to the AER's assessment of the SOC filed by LSAMCA. In particular, the SOC filed by LSAMCA does not reference any specific activities or locations which stand to be affected by the AER's decision on the

[35] AER letter re Statement of Concern No. 32130, Canadian Natural Resources Limited, Application Nos. Oil Sands Conservation Act (OSCA) 1938538, Environmental Protection and Enhancement Act (EPEA) 006-00308463, December 14, 2022, online (PDF): <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/1938538_006-00308463-20221214.pdf> at PDF p. 1.
[36] AER letter re Statement of Concern No. 32127, Strathcona Resources Ltd., Application No. 31535933, October 26, 2022, online (PDF): <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/31535933_20221026.pdf> at PDF pp. 1-2.
[37] AER letter re Statement of Concern Nos. 32241 and 32242, Adhmor Ltd., Application Nos. 1943203 and 32443152, September 21, 2023, online (PDF): <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/1943203-20230921.pdf> at PDF p. 1.

Applications, and has instead raised only general concerns which are too vague too support a finding that LSAMCA may be directly and adversely affected. While the SOC filed by LSAMCA refers to a number of specific excerpts from Summit's application materials, LSAMCA has not pointed to any Project-specific impacts at identifiable locations, and has therefore failed to show that it may be directly and adversely affected by the AER's decision on the Applications.

On September 26, 2023, the LSAMCA filed a redacted study containing further information regarding the Project site.[38] This redacted study also does not appear to provide any greater specificity regarding how LSAMCA may be impacted by the Project, in particular taking into account the narrow scope of the Applications. The lack of specific effects on the LSAMCA is consistent with the ACO's determination that approval of the Applications does not require consultation with LSAMCA. As acknowledged by the LSAMCA, in September of 2022 the Government of Alberta formally recognized LASMCA through its rigorous and comprehensive credible assertion process:[39]

> On September 29, 2022, the Alberta Government announced that LSAMCA had been successful with its credible assertion application. In having sufficiently demonstrated a credible assertion of Métis aboriginal rights through the rigorous process set out by Alberta, LSAMCA has demonstrated that the Lac Ste. Anne Métis community it represents has roots in the identifiable, historic Lac Ste. Anne Métis community, self-identifies today as the contemporary Lac Ste. Anne Métis community, and that our contemporary community is a continuation of the historic community.

Accordingly, Alberta's Indigenous Relations has extensive and thorough information regarding the LSAMCA, its members and its history. Alberta recognizes that the LSAMCA "is authorized by its members to represent the contemporary Lac Ste. Anne Métis community."[40] It should be noted that Lac Ste. Anne is located approximately 300 kilometers from the Project. Moreover, even though ACO has an in-depth understanding of the LSAMCA and its members as a result of the credible assertion process, it nevertheless, after taking into account all this information, determined that consultation with the LSAMCA was not required in connection with the Project and Applications. This finding by the ACO should not be interfered with by the AER and further demonstrates that the LSAMCA is not directly and adversely affected by the Applications.

(d) Summit response to the SOCs filed by Ermineskin and Whitefish

The AER should disregard the SOCs filed by Ermineskin and Whitefish because both were filed after the AER-established deadline for filing SOCs had passed. Both Ermineskin and Whitefish filed their respective SOCs on September 28, 2023. However, the deadline for filing SOCs was August 28, 2023 and all other parties, except AWN, were able to comply with this deadline.[41] Both Ermineskin and Whitefish filed their SOCs approximately one month after this deadline had passed and never sought

[38] Letter from T. Friedel, President, LSAMCA, dated September 26, 2023 and enclosed report "Potential Impacts to Current Use of Lands and Resources for Traditional Purposes from the Summit Mine 14 Project" dated September 2023.
[39] LSAMCA, *Métis Credible Assertion*, online: <https://lsametis.com/home/metis-credible-assertion/>.
[40] *Ibid*.
[41] On August 10, 2023, the AER granted an extension until September 28, 2023, for AWN to file its SOC. However, this extension only applied to the AWN.

an extension or advised the AER or Summit that they intended on filing late SOCs. For this reason alone, the SOCs filed by Ermineskin and Whitefish should be disregarded.

In addition, the SOCs filed by Ermineskin and Whitefish, which are very similar, should be disregarded because Ermineskin and Whitefish are not directly and adversely affected by the Applications. Both SOCs confirm that Ermineskin and Whitefish are signatories of Treaty 6, as opposed to Treaty 8, which is where the Project is located. Whitefish acknowledges that its reserve lands are not proximate to the Project and Ermineskin confirms that its reserve lands are hundreds of kilometers from the Project, near Edmonton, but that it also has members who reside at the Smallboy Camp, approximately 200 kilometers away from the Project.[42] In any case, these lands are all located a significant distance from the Project and it is therefore apparent why the ACO did not direct Summit to consult with Ermineskin or Whitefish.

Moreover, none of the additional information filed by Ermineskin or Whitefish establishes that they are potentially directly and adversely affected by the Project. The Ermineskin SOC refers to concerns with mining generally and cumulative effects. The SOC does not raise any issues specific to the Applications. Ermineskin's description of the "Project History" in its SOC only discusses the proposed mine generally and neither that section nor the subsequent section addressing the Project's "Direct and Adverse Effects on Ermineskin" contain any specific information establishing that the Applications before the AER will impact Ermineskin.

With respect to Whitefish, the SOC raises general concerns with development in the Grande Cache region and discusses the use of the area in general terms. There is no discussion of any of the specific issues raised in the Applications. There is no acknowledgement of the existing mining, electric generation and other development in the area. As a result, Whitefish's assertion that the area is currently desirable and clean, and that it is the Project that will change this, is not credible. The concerns raised in the memorandum submitted with the SOC are with regards to mining in the Grande Cache region generally. The memorandum does not raise any issues specific to the Project or the Applications.

In conclusion, as set out above in our response to the SOC filed by LSAMCA, the AER should defer to the ACO's determination and confirm that neither Ermineskin or Whitefish are directly and adversely affected by the Project. To the extent Ermineskin or Whitefish may be directly and adversely affected by the Applications, which is expressly denied, Summit submits that they have not raised any concerns warranting the holding of a hearing.

7. The SOC filed by AWN does not warrant a hearing on the Applications

Summit acknowledges that the AWN, unlike the LSAMCA and other Indigenous communities who have filed SOCs, represents Métis members who live in proximity to the Project. This is why the AWN was consulted with extensively when the original applications were filed and the AER's predecessor made its positive public interest determination approving the Project, and issued the Permit and

[42] The Ermineskin SOC states, at PDF 3: "The Project's Regional Study Area ("RSA"), a 25-kilometer buffer around the Permit Area, is located approximately 170 kilometers to the northwest of Smallboy Camp, where many Ermineskin Cree Nation members reside and visit."

Licence. As a result of those consultations and negotiations, Summit's parent company, Maxim Power Corp. ("**Maxim**"), and AWN entered into the above-noted MOU in September of 2009. This MOU contained numerous provisions regarding financial benefits, business opportunities and environmental measures associated with the Project. As a result, by way of the attached letter dated September 10, 2009 [**TAB 9**], the AWN wrote to the Energy Resources Conservation Board in support of the Project.

As indicated in AWN's SOC, Maxim has entered into an agreement with Valory Resources Inc. ("**Valory**") whereby Valory may exercise an option to purchase Mine 14. Valory is not an Australian company. It is incorporated pursuant to the laws of British Columbia with an office in Vancouver and staff in Grande Cache. Valory intends on exercising its option to acquire the Project if and when the Applications are approved so that it becomes the owner and operator of the Project. Although Maxim already has the MOU with AWN, Valory has agreed to enter into further negotiations and discussions with AWN with a view to negotiating an agreement that will address any outstanding AWN concerns and ensure that AWN benefits financially and otherwise from the Project. To facilitate these discussions, Valory has committed to providing AWN with both consultation funding and negotiation funding to support AWN's technical review of the project, engage in community consultation, and negotiate an impact-benefit agreement over the next couple of months. A written and binding agreement confirming the payment of this funding was entered into by AWN and Valory on September 28, 2023. Valory is committed to working with AWN with a view to entering into an impact benefit agreement that will apply once the Project is approved and Valory becomes the owner and operator of the Project.

As acknowledged in the SOC, Summit and AWN prepared a traditional knowledge and land use study in 2008 that set out details regarding the lands, waters, and medicinal plants used by AWN's members.[43] The AWN relies on this study to assert that the Project may impact AWN by: (i) directly reducing lands available and accessible for harvesting and gathering; (ii) impacting the health and habitat of big game and other resources; and (iii) reducing confidence in resources due to potential contamination from coal dust or selenium pollution.[44] However, all of these potential impacts arise as a result of the previously made public interest decision to allow the Project to proceed through the issuance of the Permit and Licence. The Applications are for specific authorizations prescribing detailed operating conditions and therefore, the general concerns with mining expressed by AWN are beyond the scope of the Applications. Moreover, given the AWN's written support for the Project, Summit submits that, to the extent AWN now seeks to raise additional concerns, it should be restricted to raising concerns that arise from changes to the Project from what AWN previously supported when the Permit and Licence were issued. These changes are, in Summit's submission, negligible and none have been identified by AWN as being of any concern.

Summit has reviewed the Technical Review dated September 27, 2023 and submitted with the AWN SOC.[45] The Technical Review is a critique of the Applications as filed and asserts that the materials contain insufficient information or dated information. Summit disagrees. Many of the criticisms are incorrect. For instance, the Technical Review asserts that Summit limited the hydrogeological

[43] Statement of Concern No. 32286 (September 28, 2023), PDF p. 8.
[44] *Ibid*, PDF p. 9.
[45] Statement of Concern No. 32287, Technical Review of Summit Coal Inc.'s No. 14 Mine Project for the AWN (September 27, 2023).

assessment to the Mine Portal Area. However, Figure 1 in Appendix 4 (Groundwater Assessment) shows that the hydrogeological study area is approximately 16 kilometers by 16 kilometers and encompasses the entire Project area and beyond, including AWN lands. While the focus is on the Mine Portal Area as the portal area and underground workings are the components of the Project that are expected to have a higher potential of affecting groundwater, the study area includes a much larger area. Figures 5 to 9 of Appendix 4 show other details in the study area. The Technical Review asserts that more recent data should have been used. However, there is no reason to assume that the data used, although dated, is inaccurate or misrepresentative. Finally, and in any event, Summit has recommended, and committed to, preparing and submitting a detailed groundwater monitoring program for the AER's review.

The Technical Review also asserts that there was insufficient assessment of bull trout and woodland caribou. However, there was no water in any of the drainages that are in the Project area and many of these do not have a defined channel or have very limited defined channels. The Project does not fall within any mapped caribou ranges and no caribou were observed in the Project area. Summit submits that while the Technical Review seeks to critique the work done in support of the Applications, these criticisms do not bring into question the validity of the assessment and do not justify the need for a hearing. First, to the extent the AER seeks further information from Summit to support its review, it can request that information through a supplementary information request as part of its technical review of the Applications. A lack of certain information does not mean a hearing is warranted. Second, the Technical Review fails to take into account that Summit has proposed the development of the following programs, plans and reports should the Applications be approved:

1. Groundwater Monitoring Program
2. Water Quality Monitoring Program
3. Selenium Management Program
4. Grande Cache Lake Water Quality Monitoring Program
5. Monthly Mine Wastewater Report
6. Annual Mine Wastewater Report
7. Annual Air Summary and Evaluation Report
8. Disturbance and Soil Stockpile Summary Report
9. Wildlife Mitigation and Monitoring Program
10. Comprehensive Wildlife Report

These programs will establish robust monitoring regimes and generate a wealth of data and other information that will be assessed in publically available reports. This information will be compared

against modelling predictions and used to ensure that the appropriate mitigation measures are in place. Summit is committed to sharing these reports and programs with AWN as part of its ongoing consultation.

In conclusion, Summit submits that the SOC filed by AWN does not warrant a hearing for several reasons. First, the Applications represent only minor refinements to the Project compared to when it was originally proposed and fully supported by AWN. The fact that the AWN has now changed its view regarding the merits of the Project does not justify the holding of a hearing. Second, the concerns raised in AWN's SOC and the Technical Review are with respect to mining generally, and are not with respect to the specifics of the Applications currently being adjudicated by the AER. Finally, and in any event, the Project was already subject to a public interest determination and the limited scope of the current Applications do not warrant a hearing.

8. The SOCs filed by Basaraba and Veitch do not warrant a hearing on the Applications

Summit notes that the concerns raised by Basaraba and Veitch are confined to noise, dust, and traffic concerns with respect to the Project haul road and the use of Highway 40 by haul trucks travelling to and from the Project site. In general, Summit notes that the AER has previously determined that concerns regarding noise and dust do not warrant a hearing, and that concerns relating to traffic on public roads are outside the jurisdiction of the AER.[46] While Summit submits that certain of the concerns raised by Basaraba and Veitch can be dismissed on this basis, Summit has endeavoured to respond to each of these concerns in turn below.

(a) Noise concerns

Summit completed a Noise Impact Assessment ("**NIA**") in accordance with the requirements of the AER's *Directive 038: Noise Control*.[47] The results of the NIA indicated that noise levels from the Project will be within the limits specified by the AER. Summit's NIA for the Project is attached as Appendix 13 to the Applications. Summit has also committed to conducting noise monitoring in the event that noise complaints are received.

In addition, all haul trucks used in connection with the Project will comply with highway certification requirements and will be in compliance with the Commercial Vehicle Inspection Program for Alberta. The haul trucks used in connection with the Project will also employ quiet braking technology as opposed to conventional engine retarder brakes (*i.e.*, "jake brakes").

(b) Dust concerns

The access road for the Project will have an asphalt running surface extending from the Highway 40 junction for approximately 2.5 kilometers toward the mine portal area. The asphalt running surface

[46] See, for example, AER letter re Statement of Concern No. 31497, Canadian Natural Resources Limited, Application Nos. 1919700, 1919701, May 21, 2019, at PDF p. 1, online (PDF): <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/1919700-20190521.pdf>; See also AER letter re Statement of Concern No. 31570, Canamax Energy Ltd., Application No. 1923770, October 1, 2019, at PDF pp. 1-2, online (PDF): <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/1923770_20191001.pdf>.
[47] Alberta Energy Regulator, *Directive 038: Noise Control* (Release Date: April 17, 2023), online (PDF): <https://static.aer.ca/prd/documents/directives/Directive038.pdf>.

will extend beyond the golf course, and will provide permanent dust control. The final 3.5 kilometers closest to the mine portal area, and furthest away from Highway 40, will be graveled and will have dust suppressants applied.

Summit also completed an Air Quality Assessment ("**AQA**") for the Project, which is attached as Appendix 4 to the Applications. The AQA considered total suspended particulate ("**TSP**"), particulate matter less than 10 microns (PM_{10}), and particulate matter less than 2.5 microns ($PM_{2.5}$). The results of the AQA indicated that all Project-related activities will produce dust levels well below the applicable guidelines within the Permit boundary, with the exception of 24-hour TSP levels, which are predicted to exceed guidelines levels only 2% of the time. These exceedances will impact a distance of less than 180 metres beyond the Permit boundary, which encompasses an area that is uninhabited and contains uncultivated, forested lands.

(c) Traffic concerns

Summit considered numerous options in determining the route for the Project haul road. After reviewing these alternatives, Summit determined the existing access road and alignment was the most suitable option. The intersection of the Project haul road and Highway 40 has been designed to include acceleration and deceleration lanes along with a "jug handle" design that will allow traffic to safely cross the highway to the Project haul road. This design has been approved by Alberta Transportation.

While Summit has endeavoured to select a route for the Project haul road that provides for a safe and efficient intersection with Highway 40, Summit also notes that concerns related to public safety and traffic on Highway 40 are not within the jurisdiction of the AER, and are instead under the purview of Alberta Transportation.

9. Concluding remarks

Based on the foregoing, Summit submits that each of AWA, CPAWS, LSAMCA, Ermineskin and Whitefish have failed to demonstrate that they may be directly and adversely affected by the AER's decisions on the Applications. In addition, Summit submits that the SOCs filed by AWN, Basaraba, and Veitch, while containing evidence that these parties may be directly and adversely affected, do not warrant a hearing on the Applications for the reasons discussed above.

Summit has continued to advance the Project and in doing so incurred costs totaling over $25 million since it executed the MOU with AWN, and since AWN provided its written support for the Project. The Project has been the subject of extensive regulatory review and positive public interest decisions by Alberta, resulting in the issuance of the Permit and Licence. In addition, the AER's predecessor had prepared draft *EPEA* and *WA* approvals ready for issuance pending the deposit of security for reclamation. Accordingly, Summit submits that the AER should dismiss the SOCs and proceed to process the Applications without a hearing, as it is empowered to do under section 34 of the *REDA*.

Should you have any questions, please contact the undersigned.

Yours truly,

BENNETT JONES LLP

Martin Ignasiak KC

cc: Shaun McNamara, Summit
Arthur Veitch
Kennedy Halvorson
Boyd Basaraba
Tara Russel
Tracy L. Friedel, PhD
Blair Feltmate, JFK Law
Rushang Joshi, AER
Ken Bullis, AER
Doug Koroluk, AER

TAB 1

Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

November 7, 2022

By Email Only

Carmen Wells
Fort Chipewyan Métis Association Local 125

Statement of Concern No. 32094
Syncrude Canada Ltd.
Application No. 00466043-002

Dear Carmen Wells:

You are receiving this letter because you filed a statement of concern (SOC) about Application No. **00466043-002**. The Alberta Energy Regulator (AER) has reviewed your SOC, along with the application, and all applicable requirements and other submissions or information about the application. The AER has decided that a hearing is not required to consider the concerns outlined in your SOC.

In our review of your concerns, we considered the following:

- Application No. 00466043-002 is in support of the Mildred Lake Program (MLX), and the associated Wetland Assessment and Impact Report was a condition of the AER's November 5, 2020, approval of *Water Act* Approval No. 00466043-00-00. The environmental impacts of the Dover River channel and outfall project were considered and reviewed prior to issuing the approval on November 5, 2020. Application 002-00466043 was specific in scope to conditions 3.13 through 3.15 in Approval 00466043-00-00, requiring the submission of the Wetland Assessment and Impact Report (WAIR). The review of this application focused on the WAIR relative to the Alberta Wetland Policy directives requirements.
- FCMA has not demonstrated that the proposed application would have any new or additional impacts on their rights or traditional land uses.
- FCMA expressed concerns about inadequate consultation. The AER has no jurisdiction to assess the adequacy of Crown consultation associated with the rights of aboriginal peoples; the Aboriginal Consultation Office (ACO) determines when consultation is required and adequate. Additionally,

Syncrude filed a pre-consultation assessment request for the proposed application on December 2, 2021, and was informed by the ACO that no consultation was required.

- Regarding your concerns about increased human activity in the project area are general in nature. However, Syncrude was asked to update the wetland scores in the WAIR to account for identified human uses of wetlands in the project area identified by FCMA. The updated WAIR which incorporated assumed human uses of wetlands, was submitted by Syncrude on April 14, 2022, and AER staff deemed it satisfactory.
- Regarding your concerns about the impact on wetlands, Syncrude indicated that multiple routes were considered based on engineering, infrastructure, and environmental constraints. Additionally, Syncrude provided the AER with a revised channel outfall that removes wetland disturbance at the northern end. This new route avoids disturbance of the identified A-value wetland (highest value of wetland under the Wetland Policy requiring additional considerations for avoidance and minimization of disturbance).
- Concerns about cultural resource impacts, weed management, vegetation, and cultural resources, reclamation were evaluated during the original MLX application (Decision 2019) and are not relevant to this application. The application's focus is on the Dover Channel area only. Syncrude has updated the WAIR Alberta Wetland Rapid Evaluation Tool- Actual (ABWRET-A) scores to account for the potential traditional use of wetlands.
- Concerns around indirect and cumulative effects assessments were considered in the application as per the WAIR directive.
- Regarding your concerns about reclamation and wetland compensation Syncrude has proposed in-lieu fee payments for direct wetland loss based on ABWRET-A scores using the wetland replacement fee schedule.
- Regarding your concerns about the WAIR being incomplete. AER technical staff have reviewed the WAIR and have deemed it complete and satisfactory.
- Concerns about funding are related to compensation which is outside the AER's jurisdiction.
- The concerns regarding noise, industrial fleet vehicles' emissions within the project area are general in nature, and there is insufficient information to determine a direct and adverse affect.

Based on the above, the AER has concluded that it is not necessary to hold a hearing before making a decision on the application. The AER has issued the applied-for approval, and this is your notice of that decision. A copy of the approval is attached.

All AER-regulated parties must comply not only with the conditions of their authorizations but with all of the AER's regulatory requirements. To ensure industry compliance, the AER has developed its *Integrated Compliance Assurance Framework*, which embodies the three main components of all effective compliance assurance programs those being education, prevention, and enforcement. You can find out

more about how the AER verifies industry compliance and responds to noncompliance here: https://aer.ca/regulating-development/compliance/compliance-assurance-program.

You may file a regulatory appeal on the AER's decision to issue the approval if you meet the criteria within section 36 of the *Responsible Energy Development Act*. Filing instructions and forms are located here: https://www.aer.ca/regulating-development/project-application/regulatory-appeal-process.

If you have any questions, please contact SOC@aer.ca.

Sincerely,

<Original Signed by>

On behalf of
Steven Van Lingen
Director, Oil and Sands Mining & Coal
Regulatory Applications
/ma

Enclosure (1): Approval

cc: Jack Law, Syncrude Canada Ltd.
Renato Chiarella, AER
Field Operations East, AER
ADR Inbox, AER
Environmental Protection & Enhancement and Water, AER
Aboriginal Consultation Office – FNC 202004504

TAB 2

In the Court of Appeal of Alberta

Citation: Dene Tha' First Nation v. Alberta (Energy and Utilities Board), 2005 ABCA 68

Date: 20050216
Docket: 0301-0232-AC
Registry: Calgary

Between:

Dene Tha' First Nation

Appellant

- and -

The Alberta Energy and Utilities Board

Respondent

- and -

Penn West Petroleum Limited

Respondent

- and -

Her Majesty the Queen in Right of Alberta

Intervener

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Peter Costigan

Memorandum of Judgment
Delivered from the Bench

Appeal from the Decisions by the
Alberta Energy and Utilities Board
Dated the 16th day of January, 2003 and
the 15th day of April, 2003

Memorandum of Judgment
Delivered from the Bench

Côté J.A. (for the Court):

[1] This is an appeal from the Alberta Energy and Utilities Board on three questions of law, by leave of one judge.

[2] In 2002, the respondent energy company made known to the appellant First Nation that it proposed to drill a number of wells and put in access roads, all on Crown land. None of this was within the reserve of the First Nation. There were a number of meetings and discussions between the energy company and the First Nation, and a helicopter site tour by both sides. But the First Nation wished to be paid $111,000 before those discussions could continue. The energy company tried to get some information from trappers belonging to the First Nation, but the First Nation strongly objected to that, and told the energy company to desist except through a central office. On November 26, 2002 the respondent company told the First Nation the precise legal descriptions of the proposed wells, down to the quarter section numbers.

[3] The Board issued licenses for the wells and roads, but the First Nation then applied to the Board to intervene in the matter. After an exchange of information by correspondence, the Board decided on January 16, 2003 that the First Nation had not met the statutory test for intervention, which is showing that they might be directly adversely affected. The decision letter was somewhat ambiguous as to its grounds.

[4] The First Nation applied for a reconsideration. Again there was an exchange of information by correspondence, the solicitors for the First Nation submitting one long letter and some shorter ones. At one point, an official on the Board's staff requested more details. On April 15, 2003 the Board again decided that the test of adverse impact had not been met, and did not give intervener status. The First Nation now appeals from that.

[5] The Board has extensive statutory powers, and is an important expert regulatory tribunal. In general, there is no right to appeal from it. There is one exception. There can be an appeal with leave of one judge of the Court of Appeal, which judge may confine the appeal to specified questions. That was done here. And the appeal must be on a question or questions of law or jurisdiction. So no appeal lies on a factual matter, with or without leave. The Court of Appeal has no jurisdiction over such topics.

[6] The application before the Board was for licenses for wells and ancillary roads.

[7] We will consider the nature of such an application later in this judgment.

[8] We must note at the outset that some other things are not before us. First, the First Nation expressly declines to attack the constitutionality of any legislation, and has given no notice to anyone of any such challenge. Second, the First Nation cannot appeal on the ground of inadequacy of reasons by the Board. Though there was a brief complaint during oral argument of some ambiguity in the reasons, no leave to appeal was given on that ground.

[9] The section in issue in this application is s. 26(2) of the ***Energy Resources Conservation Act of Alberta***. The section generally allows the Board to act without notice, but subsection (2) requires the Board to give certain rights to a person if "it appears to the Board that its decision on an application may directly and adversely affect the rights of [that] person . . .". No one argued before us that that was not the test.

[10] The Board correctly stated here that that provision in s. 26(2) has two branches. First is a legal test, and second is a factual one. The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.

[11] Satisfaction of the first test, some legally-recognized interest, was pretty well conceded on this appeal. That topic forms the great bulk of the material filed by the First Nation. Obviously a constitutional, a legal, or an equitable interest would suffice.

[12] Though some of the counsel at some stages seem to have thought that the Board had found no legally-recognized interest here, that is not how we read the two Board decisions. They clearly recognized the two branches (legal and factual). Though there is some ambiguity in the January 16 decision, we see none at all in the April 15 decision. Still less do we read the Board as saying that it had no jurisdiction to ask such a question (about a legally-recognized interest). The letter from a Board staff member asking for more information is not a decision by the Board, and was sent before most of the submissions were sent to the Board. The First Nation's solicitors sent lengthy letters giving a lot of authority about the legal aspects of the appellant First Nation's asserted aboriginal and treaty rights.

[13] The wording of the April 15 letter seems clear to us. When it says that no person was shown to be susceptible of direct adverse effect, it clearly makes a factual finding. That is not a mis-statement of the test; it is a statement about the factual branch of the test.

[14] It was argued before us that more recent case law on ***prima facie*** infringement of aboriginal or treaty rights changed things. But the Board still needed some facts to go on. It is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a possible aboriginal or treaty right. Some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question of fact for the Board.

[15] Whether that factual decision was correct here is not for us to say, and we lack jurisdiction to go into it.

[16] However, in case it be thought that the Board had missed some issue, or erred in something procedural, we should say one thing. Despite many opportunities, the First Nation gave the Board very little factual detail or precise information. On appeal it now asserts that the key question was adverse effect on traplines; but that is only one matter of a number vaguely asserted in the letters. The letters came from the solicitors for the appellant First Nation.

[17] The First Nation argument suggested to us that it lacked information to be more specific. As that is said to tie into the question of consultation, we will say a little about it in deference to counsel, even though it is a purely factual question.

[18] There had been discussions and provision of exact wellsite locations long before the submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were to be within the reserve. The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all land in Alberta, or in any event, all Crown land in Alberta.

[19] The First Nation also contended before us it had no duty to tell the Board specifics, and that the Board should have frozen all development while deciding the question. We cannot agree, and have seen no authority, constitutional or otherwise, requiring such a logical impasse.

[20] We repeat that we think these Board decisions sufficient for this evidentiary record, and have no power to intervene had we thought otherwise.

[21] Therefore, the answer to question #1 is that the Board did not err in the respect asked. Questions #2 and #3 by their express terms do not arise.

[22] That is really enough to dispose of this appeal.

[23] However, duty to consult those with aboriginal or treaty rights was also argued before us. Indeed, at one point we were told that it was the core issue. But that recasts the dispute, and is quite different from what the Board was told. For one thing, the consultation suggested to the Board was that the energy company had a duty to consult.

[24] It is now conceded to us that neither the energy company nor the Board has or had any duty in law to consult with those holding aboriginal or treaty rights. That concession is plainly correct today, though it may have been unclear for a time. At one point in oral argument, there was a stray reference to the Board as an “emanation” of the Crown, a characterization not argued elsewhere, and

in our view inaccurate. In the 1930s the Privy Council condemned that term as vague and apt to mislead.

[25] A duty of the Crown to consult was not really raised before the Board, though one or two phrases in the solicitors' letters make stray reference to it.

[26] Though the Crown has later intervened on this appeal, it was not a party to the Board proceedings, and got no notice of them. As no claim was made against the Crown to the Board, that is not surprising. We do not regard as notice the fact that two of many letters were copied to an official in the government's Energy Department, particularly for letters making legal points, written and sent by solicitors. We presume that that official is not a lawyer.

[27] Nor did anyone ever ask the Board to make the Crown a party, to give it notice, or to summon or implead it in any way.

[28] A suggestion made to us in argument, but not made to the Board, was that the Board had some supervisory role over the Crown and its duty to consult on aboriginal or treaty rights. No specific section of any legislation was pointed out, and we cannot see where the Board would get such a duty. We will now elaborate on that.

[29] There is no evidence here to tell the Board whether the Crown had consulted or not, and that fact is not conceded in argument. It seems to be disputed. Still less is there an evidentiary record which shows that there was no time or chance to consult. The little evidence there is suggests the contrary, but it is woefully inadequate to decide that question. Nor was anyone put on notice that that issue would be before the Board.

[30] It was properly conceded in argument that someone wishing to drill an oil or gas well, or build a road, on Crown land in Alberta needs much more than the permission of the Board of the type which the energy company here sought and got. The person wishing to drill needs a Crown license or lease, and a number of other permits from the Crown. See for example s. 19 of the ***Oil and Gas Conservation Act*** respecting access road locations on Crown land.

[31] Section 3 of that ***Act*** makes the ***Act*** cover all wells in Alberta, whether on public or private land. The Crown issues those licenses, leases, and permits; the Board does not. Nor does the Board review or cancel those. No one ever suggested to the Board in this case that it take such steps, nor that such leases, licenses or permits did not exist, nor that they were void or voidable. The topic never came up.

[32] Though the record is not completely clear on this point, the application by the energy company seems to have been under the ***Oil and Gas Conservation Act***, and its regulations. Section 4 of that ***Act*** (on scope) is about public protection from danger, and conservation of non-renewable resources (plus some issues among mineral owners). The applications seem to have been under that

Act's Part 6, which requires a license from the Board (in its capacity as the Energy Resources Conservation Board) before a well is drilled: see s. 11. Section 19 lets the Board regulate location of access roads.

[33] We do not and cannot decide whether the Crown in Right of the province has or had a duty to consult here, or whether it in fact consulted sufficiently or at all. There is no leave to raise either such question on appeal, neither arises from these proceedings, the Board did not rule upon them, and it had no cause to, on this record.

[34] We dismiss the appeal.

Appeal heard on February 11, 2005

Memorandum filed at Calgary, Alberta
this 16th day of February, 2005

Côté J.A.

Appearances:

J.R. Rath
A.T. Rana
D.F. Saly
for the Appellant

J.R. McKee
D.H. Pickup
for the Respondent Alberta Energy and Utilities Board

A.W. Carpenter
K. O'Callaghan
for the Respondent Penn West Petroleum Ltd.

T.G. Rothwell
for the Intervener Her Majesty the Queen in Right of Alberta

TAB 3

Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

August 13, 2020

By Email Only

Nissa Petterson
Alberta Wilderness Association (AWA)

Statement of Concern No. 31723
Coalspur Mines (Operations) Ltd. (Coalspur)
Application No. 001-00461266

Dear Nissa Petterson:

You are receiving this letter because you filed a statement of concern on behalf of the Alberta Wilderness Association (AWA) about Application No. 001-00461266 (the Application). The Alberta Energy Regulator (AER) has reviewed your statement of concern, along with the Application and all applicable requirements and other submissions or information about the Application and the AER has decided that a hearing is not required to consider the concerns outlined in your statement of concern.

In our review of your concerns, we considered the following:

- The AWA is located approximately 343 km from the project and does not own land in or near the project area. The AWA also does not indicate how the AWA or its members make use of the project area and how the project may impact any such activities. Accordingly, the AWA does not identify in sufficient detail how the Application may directly and adversely affect the AWA and its members.
- Your concerns regarding negative impacts to water and food security for Indigenous and non-Indigenous communities are vague.
- With respect to your concerns regarding impacts to the ecological health of the McLeod River watershed:
    - The majority of the project will be located on an existing, cleared right-of-way.

- The temporary diversion licence (TDL) is valid for one year from the date of issuance. If Coalspur wishes to continue diverting water beyond that date**,** it will be required to apply to the AER for a term licence.
- The TDL contains a Diversion Schedule that incrementally restricts Coalspur's diversion flow rates as natural season river flows decrease, ultimately requiring Coalspur to stop diversion of water entirely when McLeod River flow rates are at or below seasonal low-flow thresholds. Seasonal low-flow thresholds are established for the protection of the aquatic environment and are recommended and specified by the Government of Alberta policies and guidelines.
- The Diversion Schedule also ensures that Coalspur will stay within the surface water allocation volume and flow-rate limits specified within the *Alberta Surface Water Allocation Directive* (AEP, 2019).
- The TDL contains monitoring conditions that require Coalspur to monitor or measure the rate of flow of water in the McLeod River at regular intervals during the diversion.
- The TDL contains reporting conditions that require Coalspur to report to the AER the total volume of water diverted monthly.

- In relation to your concerns regarding impacts to species at risk such as endangered Athabasca Rainbow Trout and threatened Bull Trout:
  - Conditions in the TDL require Coalspur to design and install fish screens in accordance with the criteria set out in the Department of Fisheries and Oceans Canada's "Interim Code of Practice: *End of Pipe Fish Protection Screens for Small Water Intakes in Freshwater*."
  - The Application relates to fresh water withdrawals and does not seek authorization for any releases into the McLeod River. Concerns regarding deleterious substance inputs are, therefore, outside the scope of the Application.

Based on the foregoing, the AWA's concerns have been addressed to the AER's satisfaction or relate to a matter beyond the scope of the Application, and the AWA has not demonstrated that it may be directly and adversely affected by the Application. The AER has issued the applied-for TDL, and this is your notice of that decision. A copy of the TDL is attached.

All AER-regulated parties must comply with the conditions of their authorizations and all legislative and regulatory requirements. To ensure industry compliance, the AER has developed its *Integrated Compliance Assurance Framework*, which embodies the three main components of all effective compliance assurance programs: education, prevention, and enforcement. You can find out more about how the AER verifies industry compliance and responds to noncompliance here: https://aer.ca/regulating-development/compliance/compliance-assurance-program.

Under the *Responsible Energy Development Act* (*REDA*), an eligible person may request a regulatory appeal of an appealable decision. Eligible persons and appealable decisions are

defined in section 36 of the *REDA* and section 3.1 of the *Responsible Energy Development Act General Regulation*. If you wish to file a request for regulatory appeal, you must submit your request in the form and manner and within the timeframe required by the AER. Filing instructions and forms can be found on the AER website (www.aer.ca) under Regulating Development: Regulatory Appeal Process.

If you have any questions, please contact SOC@aer.ca.

Sincerely,

<Original signed by>

Steven Van Lingen
Director, Oil Sand Mining & Coal
Regulatory Applications
/ma

Attachment (1): Licence

cc: Brian Gregg, Coalspur Mines (Operations) Ltd.
Jonathan Toews, AER
Aphrodit Espanioli, AER
Drayton Valley Field Centre, AER
SOC Assessor, AER
AER Environmental Protection & Enhancement and Water Statements of Concern

TAB 4

In the Court of Appeal of Alberta

Citation: O'Chiese First Nation v Alberta Energy Regulator, 2015 ABCA 348

Date: 20151113
Docket: 1501-0198-AC
1501-0199-AC
Registry: Calgary

Between:

O'Chiese First Nation

Applicant

- and -

The Alberta Energy Regulator

Respondent

- and -

Shell Canada Limited

Respondent

Reasons for Decision of
The Honourable Mr. Justice J.D. Bruce McDonald

Application for Permission to Appeal the
Decisions of The Alberta Energy Regulator

Reasons for Decision of
The Honourable Mr. Justice J.D. Bruce McDonald

INTRODUCTION

[1] The applicant, the O'Chiese First Nation, brings two applications seeking permission to appeal two decisions of the Alberta Energy Regulator (AER). Those decisions are:

- Decision dated July 9, 2015 (the Rocky 5 and 6 Decision); and
- Decision dated July 9, 2015 (the Rocky 24 Decision).

[2] In the Rocky 5 and 6 Decision, the AER held that the O'Chiese First Nation was not eligible to request a regulatory appeal pursuant to section 36 and 38 of the *Responsible Energy Development Act*, SA 2012, c R-17.3, since it was not a person directly and adversely affected by an "appealable decision".

[3] In the Rocky 24 Decision, the AER held that the O'Chiese First Nation was not "directly and adversely affected" by a decision rendered under the *Public Lands Act*, RSA 2000, c R-40.

[4] The O'Chiese First Nation is part of the Saulteaux First Nation located in the area encompassed by Treaty 6 and is an Indian Band as set out in the *Indian Act*, RSC 1985, c I-5. Treaty 6 sets out the rights of the First Nation to hunt and fish on unoccupied Crown lands within the Province of Alberta as recognized and affirmed by the *Constitution Act*, 1982, Schedule B to the Canada Act (UK), c 11, reprinted RSC 1985, App II, 44. Furthermore, Aboriginal and Treaty rights of the Aboriginal peoples of Canada are recognized under Part II of the *Constitution Act, 1982*.

[5] Treaty rights under Treaty 6 were further recognized by agreement between Alberta and Canada under the *Natural Resources Transfer Agreement*, as set out in Schedule I to the *Constitution Act*, 1930, SC 1930, c 3 (the NRTA). Section 12 of the NRTA acknowledges and confirms the Treaty right of "hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

BACKGROUND

The Rocky 5 and 6 Applications

[6] On October 14 and 21, 2014, Shell Canada Limited (Shell) applied to the AER for approval of two natural gas pipelines, the Rocky 5 and Rocky 6. The Rocky 5 pipeline is approximately 1.96

km in length, with an outside diameter of 88.9 mm, and the Rocky 6 pipeline is 1.08 km in length, with an outside diameter of 114.3 mm.

[7] At the same time, Shell also applied for a pipeline agreement and a pipeline installation lease with respect to the Rocky 5 pipeline and for a pipeline agreement with respect to the Rocky 6 pipeline pursuant to the *Public Lands Act* (collectively referred to as the Rocky 5 and 6 Applications). These land dispositions give Shell the right to enter on or occupy public lands.

[8] Previously, the Government of Alberta, through its Aboriginal Consultation Office, had deemed that Crown consultation with the O'Chiese First Nation conducted by Shell to be adequate with respect to the pipeline agreements and later decided on May 15, 2014, that no consultation was required for the pipeline installation lease. The Aboriginal Consultation Office stated that Shell, as the proponent, could proceed to make applications to the AER for land dispositions.

[9] Shell filed with the AER its consultation logs with the O'Chiese First Nation as part of Shell's Rocky 5 and 6 Applications. In practice, those logs would contain any information provided by the O'Chiese First Nation to Shell regarding any impact on the O'Chiese First Nation from the Rocky 5 and 6 Applications. In this case, the logs indicate that no site-specific information was provided by the O'Chiese First Nation.

[10] Public notice of these applications was posted on the AER's website and the O'Chiese First Nation filed statements of concern regarding the applications.

[11] As required by the *Responsible Energy Development Act* and the AER Rules of Practice, the AER considered the question of whether or not to conduct a hearing with respect to the applications. In making the decision not to conduct a hearing, the AER considered the O'Chiese First Nation's statements of concern, along with the applications, the applicable requirements and other submissions or information regarding the applications, including the fact a hearing was not required under any of the AER's enactments. In making its decision, the AER considered amongst other things that "the concerns raised by OCFN are general in nature and do not provide sufficient information to demonstrate how approval of the applications may directly and adversely affect OCFN".

[12] Having determined it was not necessary to conduct a hearing to make a decision on the Rocky 5 and 6 Applications, the AER then decided to issue the applied-for licences and approvals (the Rocky 5 and 6 Approvals). Notice of the Rocky 5 and 6 Approvals was provided to the O'Chiese First Nation on December 10, 2014. In addition to providing notice of its decisions, the AER also advised the O'Chiese First Nation that it had concluded that a hearing was not necessary.

[13] On December 22, 2014, the O'Chiese First Nation filed a request for the AER to conduct a regulatory appeal of the Rocky 5 and 6 Approvals.

The Rocky 24 Applications

[14] On February 20, 2015, Shell applied to the AER under the *Public Lands Act* for a mineral surface lease and a licence of occupation. The purpose of the mineral surface lease was for a petroleum and natural gas well site, while the licence of occupation was for the use of a road (the Rocky 24 Applications).

[15] Shell made the Rocky 24 Applications through the Government of Alberta's Enhanced Approval Process. The Enhanced Approval Process allows certain applications for oil and gas developments on public land to be made on a streamlined basis. The streamlined basis allows for expedited timelines by abbreviating the standard timelines.

[16] On February 10, 2015, the Aboriginal Consultation Office deemed that Crown consultation with the O'Chiese First Nation conducted by Shell was adequate. The Aboriginal Consultation Office stated that Shell could proceed to make applications to the AER as requested.

[17] On February 10, 2015, separate notices of the Rocky 24 Applications were issued and posted on the AER's website. Each notice stated, under the heading "Filing a Statement of Concern", that:

> A decision on the application may be made immediately or on an expedited basis, but a person who believes that the person may be directly and adversely affected by the application may nevertheless file a statement of concern with the Regulator in respect of the application.

[18] This process, which could result in the AER making a decision prior to statements of concern being filed, was compliant with the Rules because the Rocky 24 Applications were made utilizing the Enhanced Approval Process and are referred to in the Enhanced Approval Process Manual.

[19] The notices indicated that to obtain copies of the Rocky 24 Applications, Shell should be contacted. The notices also indicated that to receive a copy of the application and supporting documents, an information request could be submitted to the AER Order Fulfillment department.

[20] The AER did not receive any statements of concern regarding the Rocky 24 Applications and they were approved on February 26, 2015 (the Rocky 24 Approvals). The O'Chiese First Nation thereafter filed a request for a regulatory appeal of the Rocky 24 Approvals on March 26, 2015.

AER's Decisions to Deny the Regulatory Appeals

[21] On July 9, 2015, the AER issued its two decisions dismissing the O'Chiese First Nation's requests for regulatory appeals (the Regulatory Appeal Decisions). The AER concluded that the O'Chiese First Nation was not entitled to a regulatory appeal of the Rocky 5 and 6 Approvals and

the Rocky 24 Approvals respectively because it was not directly and adversely affected by those Approvals. The AER then went on to explain the content of the directly and adversely affected test and how it was applied in these cases:

> In *Dene Tha'*, the Court of Appeal of Alberta provided guidance on what an aboriginal group must demonstrate in order to meet the factual part of the directly and adversely affected test:
>
> > [14] It was argued before us that the more recent case law on prima facie infringement of aboriginal or treaty rights changed things. But the Board still needed some facts to go on. It is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a pose aboriginal or treaty right. **Some degree of location or connection between the work proposed and the rights asserted is reasonable. What degree is a question of fact for the Board**. ...
> >
> > [18] There had been discussions and provision of exact wellsite locations long before the submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were to be within the reserve. The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all land in Alberta, or in any event, all Crown land in Alberta.
> >
> > [19] The First Nation also contended before us it had no duty to tell the Board specifics, and that the Board should have frozen all development while deciding the question. We cannot agree, and have seen no authority, constitutional or otherwise, requiring such a logical impasse. (emphasis added)

The AER had acknowledged that the O'Chiese First Nation's treaty and aboriginal rights were not at issue.

[22] Both the O'Chiese First Nation reserve and the lands covered by the Rocky 5 and 6 Approvals and the Rocky 24 Approvals (collectively the Approvals) are situated within the area delineated as the O'Chiese First Nation Consultation Area (OCFNCA). This is an area established by the Department of Aboriginal Affairs for the Government of Alberta for the purpose of helping the Crown discharge its duty to consult. The O'Chiese First Nation reserve is located some 16 – 20 kilometers from the land covered by the Approvals.

ISSUE FOR WHICH PERMISSION TO APPEAL IS SOUGHT

[23] In its written material, the O'Chiese First Nation described the basis of its application for permission to appeal as follows:

> Is there a serious, arguable case that the AER erred in law in concluding that O'Chiese First Nation is not eligible to request a Regulatory Appeal of the decision by the AER to issue the Approvals on the grounds that O'Chiese First Nation is not directly and adversely affected by the issuance by the AER of the Approvals?

[24] The O'Chiese First Nation further submits that the AER erred in law and that under the circumstances, this court should compel a review of the AER's ruling that O'Chiese First Nation is not directly and adversely affected by the AER's issuance of the Approvals.

CRITERIA FOR LEAVE

[25] An appeal from a decision of the AER to this Court is governed by the provisions of section 45(1) of the *Responsible Energy Development Act* which provides as follows:

> A decision of the Regulator [AER] is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law.

[26] Questions of fact or of mixed fact and law from which no legal error is extricable are precluded from appellate review: *Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297 at para 14, 422 AR 107.

[27] As Madam Justice Hunt of this court stated in *Bearspaw Petroleum Ltd v Alberta Energy and Utilities Board*, 2008 ABCA 405 (available online) at para 3:

> Section 41(1) of the *ERCA* provides for an appeal to this court on a question of jurisdiction or law. An applicant for leave must demonstrate that the question of law or jurisdiction raises a serious arguable point: *Atco Electric Limited v. Alberta (Energy and Utilities Board)*, 2002 ABCA 45, 299 A.R. 337 at para. 11. Subsumed in this test are four factors: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (4) whether the appeal will unduly hinder the progress of the action: para. 17.

A fifth factor that can be considered is the standard of appellate review that will be applied if leave were to be granted.

[28] Prior jurisprudence from this court has determined the degree of deference to be accorded to decisions of the AER (and its predecessor) to be:

> i) on a question of law involving the AER's knowledge and expertise, the standard is reasonableness:
>
> ii) on a question of law not involving the AER's knowledge and expertise, the standard is correctness; and
>
> iii) on a question of jurisdiction, the standard is correctness.
> *Kelly v Alberta (Energy and Utilities Board)*, 2008 ABCA 52 at para 3 and authorities cited therein, 167 CRR (2d) 14.

ANALYSIS

[29] The applicable provision of the *Responsible Energy Development Act* with respect to regulatory appeals is section 38 which states in part:

> 38(1) An **eligible person** may request a regulatory appeal of an **appealable decision** by filing a request for regulatory appeal with the Regulator in accordance with the rules.
>
> (emphasis added)

[30] Appealable decision is defined in section 36 of the *Responsible Energy Development Act*. Specifically, as regards the Rocky 5 and 6 Approvals, the relevant portions are sections 36(a)(iii) and 36(a)(iv) which provide as follows:

> 36(a)(iii) A decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 121 of the *Public Lands Act*, if that decision was made without a hearing.
>
> 36(a)(iv) A decision of the Regulator that was made without a hearing, under an energy resource enactment, if that decision was made without a hearing.

[31] In turn, "eligible person" is defined in section 36(b)(ii) as "a person who is directly and adversely affected by a decision referred to in clause (a)(iv)".

[32] The AER held that the O'Chiese First Nation, on the evidence placed before it, had not established that its rights would be directly and adversely affected by the Rocky 5 and 6 Approvals. Indeed, the O'Chiese First Nation adduced no evidence whatsoever as to how its treaty rights would in fact be impacted by the Approvals.

[33] With respect to the Rocky 24 Approvals, the AER referenced both section 38(1) and 36(a)(iii) of the *Responsible Energy Development Act* and section 121 of the *Public Lands Act* and section 211 of the *Public Lands Act Administration Regulation*.

[34] Section 121(1) of the *Public Lands Act* provides:

> A Notice of Appeal of a prescribed decision may be submitted to an appeal body by a prescribed person in accordance with the Regulations.

[35] Section 211(1) of the *Public Lands Act Administration Regulation* provides:

> 211(1) The following persons have standing to appeal a prescribed decision:
>
> (a) A person to whom the decision was given;
>
> (b) A person, including a commercial user referred to in section 98, that is directly and adversely affected by the decision.

The AER held in effect that the O'Chiese First Nation was not a party that was directly and adversely affected by the Rocky 24 Approvals.

[36] The AER in effect applied a legal standard to a set of facts; this is a question of mixed fact and law: *Housen v Nikoliasen*, 2002 SCC 33 at para 26, [2002] 2 SCR 235. That being so, it is not capable of forming the basis of an appeal to this court pursuant to section 45(1) of the *Responsible Energy Development Act*.

[37] The O'Chiese First Nation argued that its treaty rights would be directly and adversely affected by **any** development undertaken within the OCFNCA; the argument being that once a development had taken place, its traditional treaty rights are lost over the area of the development.

[38] In other words, the O'Chiese First Nation's position is that there is no requirement whatsoever upon it to adduce any specific evidence to show how the Approvals affected it. The argument is that the Approvals, as a matter of law, "directly and adversely" affect the O'Chiese First Nation's rights by the mere fact that both its reserve and the lands covered by the Approvals are situated within the OCFNCA. This court was advised that the O'Chiese First Nation took no action by way of judicial review to contest the decisions of the Aboriginal Consultation Office referred to paragraphs 8 and 16 above.

[39] A question of law, of course, can form the basis of an appeal to this court. However, the question of law must raise a "serious arguable point" as stated in *Bearspaw Petroleum Ltd* (para 26). Subsumed within this test are four factors:

- Whether the point on appeal is of significance to the practise;
- Whether the point raises significance to the action itself;
- Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- Whether the appeal will unduly hinder the progress of the action.

[40] It was urged upon this court that the issue raised by the O'Chiese First Nation is important enough to merit a determination by a full panel of this Court.

[41] There is perhaps some merit to this assertion assuming that the appeal itself has sufficient merit. Where it falters in my opinion, however, is that the argument forming the basis for these applications conflates the Crown's duty to consult with the very specific wording of both the *Responsible Energy Development Act* and the *Public Lands Act Administration Regulation*. The adequacy of the Crown's duty to consult is not at issue. It is a real obligation and one that was discharged by virtue of the decisions of the Aboriginal Consultation Office referred to in paragraphs 8 and 16.

[42] However, that duty does not inform the requirements of the relevant legislation that some party in the position of the O'Chiese First Nation must be "directly and adversely affected" by a decision of the AER as a pre-condition to be accorded a regulatory appeal. The O'Chiese First Nation, having chosen to adduce no evidence to show how it would be directly and adversely affected by the Approvals cannot now seek regulatory appeals therefrom.

[43] A decision of the AER can, as a matter of fact, "directly and adversely" affect a party such as the O'Chiese First Nation. Whether it does so or not is to be considered by the AER in light of the evidence properly adduced before it.

[44] What is equally clear however is that the phrase "directly and adversely" is not automatically engaged as a matter of law on the facts of this case. In other words, the mere fact that the developments in question are located within the OCFNCA does not mean that the Approvals "directly and adversely" affect the O'Chiese First Nation.

[45] Had the Legislature intended that a party in the position of the O'Chiese First Nation have the right to a regulatory appeal any time an Approval is granted to a development located within that party's area of consultation, it would have been easy enough for the Legislature to so provide. The fact that there is no such legislation to that effect strongly tells against the argument now being advanced on behalf of the O'Chiese First Nation.

CONCLUSION

[46] In the result, I hold that there has not been a "serious arguable point" raised by the applicant in this matter and accordingly the two applications for permission to appeal are dismissed.

Application heard on October 29, 2015

Reasons filed at Calgary, Alberta
this 13th day of November, 2015

`

McDonald J.A.

Appearances:

P. Jull, Q.C./S. S. Nagina/ C. Webster/ C. Tuharsky
for the Applicant the O'Chiese First Nation

M.G. Lacasse/ B.S. Kapel
for the Respondent the Alberta Energy Regulator

T. D. Gelbman/ S. Sutherland/ S. Assie
for the Respondent Shell Canada Limited

TAB 5

Alberta Energy Regulator

Edmonton Regional Office
Suite 205, 4999 – 98 Avenue
Edmonton, Alberta T6B 2X3
Canada

www.aer.ca

BY E-MAIL ONLY

June 22, 2018

Ryan McQuilter, Consultation Specialist

Alexis Nakota Sioux First Nation

Box 337, Glenevis, Alberta

T0E 0X0

RE: Applications 1909050 *et al.* from CST Coal Limited (CST Coal)
Statement of Concern 31183
Grande Cache Coal Mine (the Mine)

Dear Mr. McQuilter,

You are receiving this letter because you filed a statement of concern about Applications 1909050 *et al.* (the Applications) on behalf of the Alexis Nakota Sioux First Nation (ANSN). The Alberta Energy Regulator (AER) has reviewed ANSN's statement of concern along with the Applications, the applicable requirements, and other submissions or information about the Applications and has decided that a hearing is not required under an enactment or otherwise necessary to consider the concerns outlined in ANSN's statement of concern.

In its review of ANSN's concerns, the AER considered the following:

- ANSN states that it was not consulted with respect to prior operations at the Mine by Grande Cache Coal Corporation (GCC) or the Crown, and has not been properly consulted by CST Coal respecting the Applications. However, section 21 of the *Responsible Energy Development Act* (*REDA*) states that the AER has no jurisdiction to assess the adequacy of Crown consultation associated with the rights of indigenous peoples.
- ANSN also states that the Mine is in an area of importance to ANSN, and that the Applications have the potential to interfere with the quality of traditional resources relied upon for the exercise of ANSN's Treaty and Aboriginal rights. Although the Mine is located on lands ANSN identifies as within its traditional territory, the statement of concern does not identify specific locations where ANSN's members

might be affected or provide the detail needed to show a degree of location or connection with the Mine that would demonstrate that the ANSN and its members are directly and adversely affected by the AER's decision regarding the Applications.[1] The fact that the Mine may be within ANSN's traditional territory does not by itself demonstrate that ANSN is directly and adversely affected by the Applications.[2]

- The Mine is approximately 190 kilometers away from the closest ANSN reserve lands (Alexis Cardinal River #234).
- CST Coal provided a response, on June 1, 2018, to a number of ANSN's concerns, including a brief overview of CST Coal's background in mining, a summary of CST Coal's consultation activities to date, and CST Coal's intentions regarding start-up and operation of the Mine.
- CST Coal confirms in its June 1, 2018 response that if the approvals are transferred to CST Coal, it will contact ANSN to discuss any outstanding concerns ANSN may have with operations at the Mine.
- The requirements of *Directive 056: Energy Development Applications and Schedules* do not apply in this case because the Applications relate to the transfer of permits, licences, approvals, dispositions and existing applications for a coal mine rather than the construction or operation of a petroleum industry energy development that includes facilities, pipelines or wells.
- ANSN will have further opportunity to voice its concerns regarding CST Coal's proposed activities at the Mine on subsequent applications CST Coal may seek approval for in relation to same provided ANSN meets the AER's filing requirements.

Based on the foregoing, the majority of the concerns raised by ANSN relate to a matter outside of the AER's jurisdiction and have been or will be addressed to the AER's satisfaction. Further, ANSN has not demonstrated that ANSN may be directly and adversely affected by approval of the Applications. **In recognition of ANSN's concerns regarding the lack of information it has received to date about the Mine, the AER is**

[1] *Dene Tha' First Nation v. Alberta (Energy and Utilities Board),* 2005 ABCA 68 at paras 10, 14, 18.
[2] *Ibid; O'Chiese First Nation v. Alberta (Energy Regulator),*2015 ABCA 348 at paras 43-45.

encouraged that CST Coal has committed to contacting ANSN if the approvals are transferred to discuss any outstanding concerns ANSN may have and asks CST Coal to, as part of this outreach, provide ANSN with copies of the Applications.

The AER has not made a decision on the Applications at this time and ANSN will be provided notice when that decision is made. If a hearing on the Applications is to be held for another reason, a notice of hearing will be published.

Under the *REDA* an eligible person may file a request for a regulatory appeal on an appealable decision. Eligible persons and appealable decisions are defined in section 36 of the *REDA* and section 3.1 of the *Responsible Energy Development Act General Regulation*. If you wish to file a request for regulatory appeal, you must submit your request in the form and manner and within the timeframe required by the AER. You can find filing requirements and forms on the AER website www.aer.ca under Applications & Notices: Appeals.

If you have any questions, contact Corey MacGarva at 780-642-9342 or e-mail Corey.MacGarva@aer.ca, or SOC@aer.ca

Sincerely,

<Original signed by>

Erik Kuleba
Director of Mining, Authorizations

cc: Brad Gilmour, Bennett Jones LLP for CST Canada Coal Limited, gilmourb@bennettjones.com
Corey MacGarva, AER Application Coordinator, Corey.MacGarva@aer.ca
AER Statement of Concern Inbox, SOC@aer.ca
AER Drayton Valley Field Centre, DraytonValley.FieldCentre@aer.ca
Fiona LeBlanc, ASE Regional Manager, Fiona.LeBlanc@aer.ca

ADR Mailbox, AER, ADR@aer.ca

AER Public Lands Regional Office, AERAuth.Mining@aer.ca

AER Environmental Protection & Enhancement and Water Statements of concern, EPEA.WASOC@aer.ca

AER Indigenous Engagement, AR.Director@aer.ca

Aboriginal Consultation Office, IR.SOCContact@gov.ab.ca

inquiries 1-855-297-8311
24-hour emergency 1-800-222-6514

TAB 6

Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

December 14, 2022

By Email Only

Melina Power
Lakeland Métis Community Association (LMCA)

Statement of Concern No. 32130
Canadian Natural Resources Limited (CNRL)
Applications No. *Oil Sands Conservation Act (OSCA)* 1938538
***Environmental Protection and Enhancement Act (EPEA)* 006-00308463**

Dear Melina Power:

You are receiving this letter because you filed, on behalf of LMCA members, a statement of concern (SOC) about Applications No. 1938538 and 006-00308463. The Alberta Energy Regulator (AER) has reviewed your SOC, along with the applications, and all applicable requirements and other submissions or information about the applications. The AER has decided that a hearing is not required to consider the concerns outlined in your SOC.

In our review of LMCA's concerns, we considered the following:

- The LMCA is located in the Lac La Biche Area. The proposed project location is approximately 106 km N of LMCA.
- LMCA raised concerns regarding aboriginal rights and traditional land use activities including hunting, trapping, and fishing in the areas around Sunday Creek and within Christina Lake, Kirby Lake, Grist Lake and Winefred Lake, which are LMCA's specified areas of concern.
- Your SOC does not provide information about where members conduct their traditional land use activities or how the activities may be impacted by the proposed project. The concerns raised by LMCA are general in nature.

- CNRL has developed proposed mitigation measures that will be implemented to reduce project-related effects on fish and fish habitat. Further, CNRL has stated that the surface development for Pike 1 will maintain a minimum 300 m setback from Kirby Lake.
- Winefred Lake, Christina Lake, and Grist Lake are located approximately 8 km, 10 km and 18 km, respectively, from the proposed project footprint. Sunday Creek is approximately 4 km from the proposed project footprint and no crossings or disturbances of Sunday Creek are proposed in the Applications.
- Regarding concerns about Moose habitat, CNRL established a Moose and Caribou Assessment Area (MCAA) to evaluate the potential direct and indirect effects of the project development on the moose habitat. The MCAA includes the proposed project footprint plus a 5 km buffer for a total area of 22,483,70 ha. CNRL's evaluation determines that, with implementation of proposed mitigation measures, the effects of the proposed Trunkline on Moose habitat availability are expected to be low. Additionally, the application has been reviewed by an AER Wildlife Biologist who has deemed the application satisfactory.
- CNRL must adhere to all Approval conditions, including any new conditions and those set out in the original *OSCA* Scheme Approval No. 12301 and *EPEA* Approval No. 308463-00-00.
- LMCA's requests that the AER direct CNRL to develop an engagement plan, including timelines and funds for traditional knowledge and land use studies which are related to aboriginal consultation office (ACO) adequacy and compensation that are outside the AER's jurisdiction. Additionally, CNRL filed a pre-consultation assessment request for the proposed project on June 22, 2022, and was informed by the ACO that no consultation with LMCA was required.

Whether a decision of the AER may directly and adversely affect a statement of concern filer, such as LMCA, is to be considered by the AER in light of the evidence properly adduced before it.[1] LMCA has not demonstrated that it may be directly and adversely affected by the application. Based on the above, the AER has concluded that it is not necessary to hold a hearing before making a decision on the applications. The AER has issued the applied-for approvals, and this is your notice of that decision. A copy of the approvals are attached.

All AER-regulated parties must comply not only with the conditions of their authorizations but with all of the AER's regulatory requirements. To ensure industry compliance, the AER has developed its *Integrated Compliance Assurance Framework*, which embodies the three main components of all effective compliance assurance programs those being education, prevention, and enforcement. You can find out more about how the AER verifies industry compliance and responds to noncompliance here: [1]https://aer.ca/regulating-development/compliance/compliance-assurance-program.

[1] *O'Chiese First Nation* v *Alberta Energy Regulator*, 2015 ABCA 348, paragraph 43.

You may file a regulatory appeal on the AER's decision to issue the approvals if you meet the criteria within section 36 of the *Responsible Energy Development Act*. Filing instructions and forms are located here: https://www.aer.ca/regulating-development/project-application/regulatory-appeal-process.

If you have any questions, please contact SOC@aer.ca.

Sincerely,

<Original signed by>

Andrew MacPherson
Director, In Situ
Regulatory Applications
/as

Attachment (2): Approvals

cc: Marc Scimshaw, CNRL
SOC Inbox, AER
Felix Chiang, AER
James Chen, AER
Field Operations East, AER

TAB 7

Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

October 26, 2022

By Email Only

Nicole Nicholls
Cold Lake First Nations (CLFN)

Statement of Concern No. 32127
Strathcona Resources Ltd. (Strathcona)
Application No. 31535933

Dear Nicole Nicholls:

You are receiving this letter because you filed a statement of concern (SOC) on behalf of CLFN about Application No. 31535933. The Alberta Energy Regulator (AER) has reviewed your SOC, along with the application, and all applicable requirements and other submissions or information about the application. The AER has decided that a hearing is not required to consider the concerns outlined in your SOC.

In our review of CLFN's concerns, we considered the following:

- Strathcona Resources Ltd. applied for a *Water Act* approval and approval for a Mineral Surface Lease to construct an observation well and a Licence of Occupation to access Class IV – Frozen/Dry conditions at 4-16-064-03W4M.The proposed project is located on Crown land, approximately 5.3 km from the west boundary of the CLFN's reserve lands and the project is located within land that the CLFN members consider to be part of their traditional territory
- The CLFN raised concerns regarding aboriginal rights and traditional land use activities. Specifically, CLFN states that after a desktop review it was determined that the project conflicts with CLFN land use and harvesting of resources, impacts culturally significant plants and culturally sensitive sites, disrupts CLFN continuity of land use and harvesting, and contributes to the cumulative, long-term degradation of CLFN rights and shrinks the total area available for CLFN to practice their Indigenous Rights.

- The information provided in the CLFN's SOC is general in nature and does not identify direct and adverse impacts that may result from the proposed project, including how its members rights or traditional land use activities may be negatively impacted.
- CLFN submits that within the proposed well site boundaries is prime ungulate habitat. However, a wildlife assessment overview was completed by Basin Environmental on November 20, 2021, and it was determined that no significant wildlife features were found in the area. Further, CLFN did not provide evidence to suggest that hunting had been traditionally carried out in the area, or at what frequency.
- The SOC also mentioned that it has concerns about land use and harvesting of resources, including culturally sensitive plants, however, CLFN does not provide information about how these land use activities are undertaken by CLFN members or provide information about where the activities are located or how the activities may be impacted by the proposed project.
- Regarding CLFN's concerns that the project contributes to the cumulative, long-term degradation of its members' rights and shrinks the total area available to CLFN to practice their Indigenous Rights, the Government of Alberta's environmental frameworks under its delineated Regional Plans are the appropriate mechanisms for identifying and managing regional cumulative effects of resource development activities.
- This application relates to lands that fall within the Lower Athabasca Regional Plan (LARP) region. Accordingly, the LARP is the appropriate mechanism through which to identify and manage the regional cumulative effects of resource development activities. The activities proposed in the area of the application are permitted under LARP.

Whether a decision of the AER may directly and adversely affect a statement of concern filer, such as CLFN, is to be considered by the AER in light of the evidence properly adduced before it.[1] Based on the above, the CLFN has not demonstrated that it may be directly and adversely affected by the application. As a result, the AER has concluded that it is not necessary to hold a hearing before making a decision on the application. The AER has issued the applied-for approval, and this is your notice of that decision. A copy of the approval is attached.

All AER-regulated parties must comply not only with the conditions of their authorizations, but with all of the AER's regulatory requirements. To ensure industry compliance the AER has developed its *Integrated Compliance Assurance Framework*, which embodies the three main components of all effective compliance assurance programs, those being education, prevention, and enforcement. You can

[1] *O'Chiese First Nation* v *Alberta Energy Regulator*, 2015 ABCA 348, paragraph 43.

find out more about how the AER verifies industry compliance and responds to noncompliance here: https://aer.ca/regulating-development/compliance/compliance-assurance-program.

You may file a regulatory appeal on the AER's decision to issue the approval if you meet the criteria within section 36 of the *Responsible Energy Development Act*. Filing instructions and forms are located here: https://www.aer.ca/regulating-development/project-application/regulatory-appeal-process.

If you have any questions, please contact SOC@aer.ca.

Sincerely,

<Original signed by>

Andrew MacPherson
Director, InSitu
Regulatory Applications

/mc

Attachments (1): Approval

cc: Len Moriarity, Strathcona Resources Ltd.
Derek Rosso-Peck, AER
SOC Inbox, AER
Field Operations East, AER
Public Lands Regional Office, AER
Environmental Protection & Enhancement and Water, AER
Aboriginal Consultation Office – FNC 202250866-001

TAB 8

Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

September 21, 2023

By Email Only

Lorne Wiltzen, Industry & Government Relations Corporation, on behalf
Fort McMurray #468 First Nation

Statement of Concern No. 32241 and 32242
AdhMor Ltd. (AdhMor)
Application No. 1943203 and 32443152

Dear Sir:

You are receiving this letter because you filed a statement of concern (SOC) about Applications No. 1943203 and 32443152. The Alberta Energy Regulator (AER) has reviewed your SOC, along with the Applications, and all applicable requirements and other submissions or information about the applications. The AER has decided that a hearing is not required to consider the concerns outlined in your SOC.

In our review of your concerns, we considered the following:

- Fort McMurray 468 First Nation (FM468FN) has not sufficiently demonstrated how its members may be directly and adversely affected by the proposed Applications.
- Although the Project is located within the FM468FN traditional lands where members exercise treaty rights and traditional land use activities and is located approximately 7.87 km west of FM468FN Reserve lands, the SOC does not, without further factual connection, establish that FM468FN members may be directly and adversely impacted by the applications. Further information is required to establish a sufficient degree of location or connection between the Applications and the potential interference or adverse impacts on the rights and traditional uses asserted.
- Additionally, the information provided in the FM468FN SOC did not identify any significant habitat features or important hunting areas within the site footprint. FM468FN members will continue to have the ability to practice their treaty rights and traditional use activities around the Project footprint.

- Furthermore, the Public Lands amendment application is administrative in nature and is required to change the purpose/activity of the disposition from a Mineral Surface Lease (MSL) - Disposal to a Miscellaneous Lease (MLL) Oilfield Waste Management Facility. No new disturbance will be associated with the proposed Project as the site will be located on an existing constructed lease. The proposed Project area is situated on an historic borrow pit that has previously been cleared of all trees and stripped of topsoil as part of the construction that took place for the twinning of highway 63 in 2015, and no additional lands are being requested outside of the existing disposition.
- The AER acknowledges your concerns regarding Crown consultation; however, thuest for the proposed Project with the ACO on May 31, 2023, and was informed by the ACO that no consultation was required because the ACO had previously determined that adequate consultation had been conducted in 2022 for the existing Public Lands MSL disposition under FNC202203224-005 and FNis is outside of the AER's jurisdiction and your concerns about Crown consultation should be raised with the ACO. The AER is aware that AdhMor filed a pre-consultation assessment reqC202203224-006.
- The AER acknowledges your concerns regarding cumulative impacts on the traditional territory of FM468FN. However, the Project area is within the Lower Athabasca Regional Plan (LARP), which addresses the management of cumulative impacts on the environment on a regional basis. The proposed Project is permitted under LARP.
- The AER notes your concerns regarding the potential impacts on freshwater and wetlands. A supplemental information request (SIR) was sent by the AER to AdhMor regarding the storm water runoff pond size and location. AdhMor committed to relocating the pond further north for a greater setback to the water bodies and confirmed the pond is designed to accommodate a 1 in 25-year rain event (which is greater than the minimum requirement of 1 in 10-year rain event).
- AdhMor must comply with Directive *055: Storage Requirements for the Upstream Petroleum Industry* and *Directive 058: Oilfield Waste Management Requirements for the Upstream Petroleum Industry* requirements for the duration of the Project.
- AdhMor is required to address all operational complaints, if any arise, regarding approval conditions. FM468FN may contact the AER Energy and Environmental Emergency 24-Hour Response Line at 1-800-222-6514 to file an operational complaint if one arises during the Project's operations.
- Your concerns regarding impacts to wildlife, specifically moose and caribou habitat have been addressed as there are no key wildlife diversity zones intersected in the Project area nor is the Project located in a caribou zone. A sweep was conducted by AdhMor on May 7, 2023, where no wildlife or significant habitat features were identified within the proposed Project area.
- The AER acknowledges your concern regarding the FM468FN's identified a10 km moratorium zone. However, the FM468FN's moratorium zone does not currently exist as an approved Government of Alberta moratorium zone and the AER has no authority to delay processing of these applications at this time.

Based on the above, the AER has concluded that it is not necessary to hold a hearing before making a decision on the Applications. The AER has issued the applied-for approvals, and this is your notice of those decisions. Copies of the approvals are attached.

All AER-regulated parties must comply not only with the conditions of their authorizations, but with all of the AER's regulatory requirements. To ensure industry compliance the AER has developed its *Integrated Compliance Assurance Framework*, which embodies the three main components of all effective compliance assurance programs, those being education, prevention, and enforcement. You can find out more about how the AER verifies industry compliance and responds to noncompliance here: https://aer.ca/regulating-development/compliance/compliance-assurance-program.

You may file a regulatory appeal on the AER's decision to issue the approvals if you meet the criteria within section 36 of the *Responsible Energy Development Act*. Filing instructions and forms are located here: https://www.aer.ca/regulating-development/project-application/regulatory-appeal-process.

If you have any questions, please contact SOC@aer.ca.

Sincerely,

<Original Signed By>

Andrew MacPherson
Director, In Situ
Regulatory Applications
GF/bg

Attachments (2): Approvals

cc: Donovan Baillie, AdhMor Ltd.
Eva Lew, Bennett Jones SLP
Cassy Johnson, AER
Laura Van DerVeen, AER
SOC Inbox, AER
Field Operations Northeast, AER
Aboriginal Consultation Office – **FNC202353064**

TAB 9

Aseniwuche Winewak Nation of Canada

September 10, 2009

Energy Resources Conservation Board
640 - 5th Avenue S.W.
Calgary, AB T2P 3G4

Attention: J.P. Mousseau

Dear Mr. Mousseau:

Subject: **Milner Power Inc. Mine #14**
Application No. 1521988

The purpose of this letter is to advise that the Aseniwuche Winewak Nation ("AWN") has now entered into a Memorandum of Understanding with Maxim Power Corp. regarding the Mine #14 project. The AWN understands that the Board will thoroughly review the application prior to approval to ensure that required standards are met. Accordingly, we support the application and withdraw from this proceeding.

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Yours,

(David MacPhee)

Cc Milner Power Inc., Attn: Mr. T. Knutson

Street: 10020 99 St. **Mail:** Box 1808, Grande Cache, AB T0E 0Y0 **Phone:** (780) 827-5510 **Fax:** (780) 827-4788 **web:** www.aseniwuche.com